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IN THE

Supreme Court of the United States

October Term, 1968

No. 1274

W. T. SMITH,
Petitioner,

vs.

A. P. STOUTOMIRE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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ALABAMA PRINTERS, INC., MONTGOMERY, ALABAMA

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

1

Petitioner herein respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Alabama entered on November 21, 1968, which affirmed a $4,919 judgment for punitive damages entered on October 26, 1967, in the Circuit Court of Mobile County, Alabama against petitioner, in a suit for an alleged fraud and misrepresentation based on an oral agreement to construct a house for Respondent.

Opinions Below

The opinion of the Supreme Court of Alabama in SMITH v. STOUTOMIRE, is reported at ..... Ala. ..... So.2d, and is set forth in Appendix B, infra, pp. ..... The opinion of the Circuit Court of Mobile County, Alabama is also printed in Appendix B, infra, pp. .....

Jurisdiction

The judgment of the Supreme Court of Alabama was entered on November 21, 1968. The jurisdiction of this Court is based on 28 U. S. C. § 1257(3), petitioner having alleged below, and alleged herein the denial of due process, deprivation of rights, and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

1. Whether the Alabama Supreme Court may invoke procedural requirements which are not regularly followed so as to thwart review in the Supreme Court of the United States and deprive petitioner of constitutionally protected rights?

2. Whether the right of the petitioner to due process as guaranteed by the Fourteenth Amendment is violated by affirmance of a judgment by the Alabama Supreme Court which makes ineffective the purpose and intent of the Federal Bankruptcy Statute, and which permits employees of a Bankrupt to be sued on the alleged ground that bankrupt employees committed fraud upon respondent along with the bankrupt?

Constitutional Provisions Involved

This case involves Section I of the Fourteenth

Amendment to the Constitution of the United States.

Statement

The Respondent, A. P. STOUTOMIRE, instituted suit seeking damages in the amount of Ten Thousand Dollars ($10,000) against Ferrell Construction Company, a corporation and the XYZ Co., a corporation, a sole proprietorship, whose name is otherwise unknown and which will be added by amendment when ascertained and W. T. Smith, Perry Coleman, and William L. Ferrell, jointly and individually.

Ferrell Construction Company was an unincorporated business owned by William L. Ferrell. W. T Smith, the petitioner herein, a seventy-year-old minister, was employed part-time as a salesman as was one Perry Coleman, a defendant below and the petitioner, W T. Smith, were given titles as Vice-president and Secretary-treasurer respectively by William L. Ferrell, who was in fact the owner and President of Ferrell Construction Company.

During late June or early July of 1965, Respondent Stoutomire had a conference with William L. Ferrell. At that time an oral agreement was entered into between respondent and Ferrell to build a house for respondent for an agreed consideration of $17,500.00. In furtherance of said agreement, respondent paid to William L. Ferrell on August 13, 1965, $500 deposit as a partial down payment.

The evidence is undisputed that William L. Ferrell the respondent, as well as all other amount purportedly paid by respondent.

At the trial respondent offered evidence to show that petitioner W. T. Smith, received $250 on November 30. 1965 and One Hundred Dollars on November 20, thereafter received personally One Hundred Dollars from the respondent, as well as all other amounts purportedly

paid by respondent. At the trial respondent offered evidence to show that petitioner had reecived $250.00 on November 30, 1965, and One Hundred Dollars on November 20, 1965. Petitioner testified that he had never received any money from the respondent and that the receipt bearing his signature had been forged. Several months before the suit was brought by the respondent, Ferrell Construction Company and William L. Ferrell were adjudicated bankrupts, and thereafter Ferrell was convicted and sentenced to prison for forgery.

Evidence indicated that William L. Ferrell had placed Perry Coleman and W. T. Smith on salary and that his Company was indebted to both Coleman, Smith, and other employees when the business became insolvent.

Respondent joined Perry Coleman and petitioner W. T. Smith as co-defendants in his suit for damages on the grounds that each were officers of the Ferrell Construction Company when said business became bankrupt and by virtue of the association of the parties, each defendant was guilty of false and fraudulent representation. Respondent also claimed that the defendants below knew that the representation made to him were false at the time they were made and had no intentions of carrying them out. Respondent failed to introduce evidence of either an oral or written contract between himself, Coleman and the petitioner herein.

Respondent also claimed an equity credit of $300.00 against defendants below for an automobile, which he sought to sell to another employee of Ferrell Construction Company, but which did not result because respondent was delinquent in note payments on the automobile in question and the finance company would not permit respondent to transfer title to another party without their approval. Several other witnesses testified that claims had been filed against the bankrupt Ferrell Construction Company and William L. Ferrell, but had received no part of their loss as of the date of the trial of this cause.

By claiming that Perry Coleman and petitioner were confederates with William L. Ferrell and alleging fraud and misrepresentation, respondent sought to obviate the purpose and intent of the Bankruptcy Statute and obtain damages from others who had never made any promises to him and who were in no wise obligated to him on other grounds.

Respondent also claimed $1,000 damages for conversion, although the respondent still had title and exclusive possession of the 1961 LeSabre Buick automobile on the day of the trial of the cause and testified to this fact.[1]

As an additional item of damage, respondent claimed that the bankrupt Ferrell Construction Company was indebted to him for work and labor in the amount of $355.00.

After filing suit against defendants below, respondent filed an amendment to his complaint by adding Count 5 claiming $5,000 damages for fraud, deceit and misrepresentation (later amended to increase damages to $10,000). On October 26, 1967 a jury awarded damages in favor of the respondent in the amount of $4,919.00.

On October 31, 1967, an appeal from the judgment of the Circuit Court of Mobile County, Alabama was taken only by petitioner W. T. Smith to the Supreme Court of Alabama, with the assistance of church members and friends serving as surety on his behalf, and whose property is presently in the process of being sold, pending the determination of this petition for Certiorari from the judgment of the Alabama Supreme Court affirming the judgment below. Having no tangible assets of any description, Perry Coleman and William L. Ferrell

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[1] Record of trial proceeding, p. .....

did not perfect appeal to the Alabama Supreme Court or join in this petition.

On November 21, 1968, the Alabama Supreme Court affirmed the judgment of the trial court, without considering appellant's Assignments of Error because of so-called procedural defects. The Alabama Supreme Court held in effect that petitioner had not observed procedural rules and because of this defect, the Court claimed it could not consider assigned errors.

On December 2, 1968, petitioner moved for a rehearing and submitted a brief in support thereof The Alabama Supreme Court summarily denied the petition for rehearing without an opinion on January 16, 1969, and the petitioner being unable financially to post a supersedeas bond has nevertheless filed the petition herein.

Reasons for Granting the Writ

This petition presents two serious and substantial issues involving a subtle denial of substantive and procedural due process of law by the Alabama Supreme Court in violation of the Fourteenth Amendment to the Constitution of the United States. Fundamentally, the effect of the present affirmance by the Alabama Supreme Court could effectively thwart review of the present petition even though petitioner has complied with procedural rules, not only in form, but also in substance. By a simple recitation in its opinion that petitioner had failed to observe the procedural rules of the Alabama Supreme Court and because of this defect, the Court was prevented from a consideration of Errors assigned by petitioner. This practice of the Alabama Supreme Court is apparently now well-known by this Court. In **N.A.A.C.P. v. Alabama,** 377 U.S. 296, 84 S.Ct. 1302, 1308 (1964), this Court stated:

"The Consideration of asserted constitu-

> tional rights may not be thwarted by a simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form in every real sense."

In **Davis v. Wechsler,** 263 U.S. 22, 44 S.Ct. 13, (1923) this Court held that it would not contenance as final the decision of a state tribunal as to what are the facts alleged to give rise to a federal right, or to bar the assertion on local grounds; and that local practice will not be allowed to defeat or to unreasonably hinder the assertion of federal rights.

Whether a state court by putting forward non-federal grounds of decision which are without fair or substantial support, so as to preclude rights under the federal constitution has also been considered by this Court and was answered in **Staub v. City of Boxley,** 355 U.S. 313, 78 S.Ct. 277 (1958).

In **Barr v. Columbia,** 378 U.S. 146, 149, 84 S.Ct. 1734, 1736 this Court stated:

> "We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review. See e.g., **N.A.A.C.P. v. Alabama** ex rel Flowers, 377 U.S. 288, 84 S.Ct. 1302; **Shuttlesworth v. Birmingham,** 376 U.S. 339, 84 S.Ct. 795, 11 L.Ed.2d 766; **Wright v. Georgia,** 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349; **N.A.A.C.P. v. Alabama** ex rel Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1499."

Unconstitutional decisions of state courts should be restrained, **Central Land Co. v. Laidley,** 159 U.S. 103, 16 S.Ct. 80, and wrong judgments corrected, **Herb v. Pitcairn,** 324 U.S. 117, 65 S.Ct. 459.

The severity of the decision by the Alabama Supreme Court becomes suspect, particularly where Rule 9 as promulgated by the Alabama Supreme Court states that the rule in question is directory. The Court from the time of its adoption has exercised its discretion in the consideration of briefs which fairly and helpfully make the points upon which the petitioner relies.

Indicative of the "mere directory" aspect of the rule, the Alabama Supreme Court in **Bolton v. Barnett Lumber and Supply Co.,** 267 Ala. 74, 100 So.2d 9, held that its rules governing the form of an appellant's brief is directory. Again, in **City of Montgomery v. Mott,** 266 Ala. 422, 96 So.2d 766, there were 25 assignments of error, none of which were numbered in the appellant's brief and the Alabama Supreme Court said that appellant's brief did not strictly conform with the rules governing the form and contents of appellant's brief, but that it did not feel that the defects in the brief warranted a dismissal of the appeal.

The Alabama Supreme Court also stated in the above cited case that:

> "We have condoned noncompliance with the rule in question when the record is short and simple and when a strict compliance with the rule is not essential to an understanding of the assignments of error which are argued in appellant's brief."

In **Brooks v. Everett,** 271 Ala. 380, 124 So.2d 100, the Alabama Supreme Court considered assignments of error although there were 38 of them and none had been specifically referred to in appellant's brief. The Court said:

> ". . . (w)e have held that although appellant's brief does not comply with the rules of

> this court, if it fairly and helpfully makes the points upon which the appellant relies, this court may in its discretion, consider those points on their merit." **Ibid.**

See also **Stariha v. Hagood,** 352 Ala. 158, 162, 40 So.2d 85, 89; **Quinn v. Hannon,** 262 Ala. 630, 632, 80 So.2d 239, 241; **Thompson v. State,** 267 Ala. 22, 99 So.2d 148.

In view of the long history of the Alabama Supreme Court's abuse of its discretion, which has permitted the Court to consider assigned errors in one case and refuse to do so in other cases, this Court in **N.A.A.C.P. v. Alabama,** 377 U.S. 288 at 301, 84 S.Ct. 1302 at 1310 stated:

> "In sum, we think that what we said when this litigation was first here, with respect to the procedural point there asserted as a state ground of decision adequate to bar review of the merits also fits the present situation."
>
> "Novelty in procedural requirement cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." 357 U.S., at 457-458, 78 S.Ct., p. 1169.

Respondent's effort to avoid process against Perry Coleman and the petitioner W. T. Smith as authorized by Section 18 of the Bankruptcy Act became manifest by his act of instituting suit in a state court instead of pursuing his remedy in the Bankruptcy Court. **Local Loan Co v. Hunt,** 292 U.S. 234, 54 S.Ct. 695 (1934), which established the rule that a creditor's suit to collect after discharge could be restrained. The bankruptcy court had ancillary jurisdiction to preserve the advantages of its judgment of discharge as to William L. Ferrell and Ferrell Construction Company. If it can be assumed that Ferrell

Construction Company was a **de facto** corporation, then its obligation, nevertheless, would be discharged as to the petitioner, W. T. Smith and the other defendants below as purported officers of Ferrell Construction.

Petitioner was merely an employee of Ferrell Construction Company as the evidence reveals, and had not been guilty of fraudulent behavior as alleged by the respondent.

In **Personal Industrial Loan Corp. v. Forgay,** 240 F.2d 18 cert den (1957), 354 U.S. 922, 77 S.Ct. 1380, the Tenth Circuit stated:

> ". . . (T)he bankruptcy court has the power to effectuate the adjudication and order made by the Court in a bankruptcy proceeding. This power is a continuing power and may be invoked after order of discharge and after termination of the bankruptcy proceeding in the bankruptcy court. The court has a continuing duty and solicitude to see that a discharged bankrupt is not unduly denied the benefits of his adjudication and discharge."

If it were assumed that Perry Coleman and petitioner W. T. Smith were partners with William L. Ferrell as asserted by the respondent, Section 18 of the Bankruptcy Act required service to be made upon all partners not parties to the filing of the voluntary bankrupt petition. The verified petition of the bankrupt William L. Ferrell indicated that Ferrell Construction Company was owned by him in his private capacity. Any obligation to respondent by Ferrell Construction Company and William L. Ferrell should not have involved an employee in petitioner's position so as to adversely affect his property rights in violation of the guarantees and protection of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The provisions of Section 96 of the National Bankruptcy Act provides to the contrary notwithstanding, that statutory liens in favor of employees or former employees such as the Respondent and others shall be perfected by filing notice thereof in the bankruptcy court so as to preserve their claim.

If this case stands unreviewed and unreversed, not only will the protection of property rights be impeded, but the Alabama Supreme Court will have been given permission to place a curtain of silence over erroneous verdicts and judgments in violation of the due process clause of the Fourteenth Amendment. **Thompson v. City of Louisville, et al.**, 362 U.S. 199.

As stated above, the Supreme Court of Alabama seeks to resort to absurd procedural technicalities as a basis of ignoring rights of the petitioner to due process in the Courts of the State of Alabama.

As this Court said in **Yick Wo. v. Hopkins,** 118 U.S. 356 (1886):

> "Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . ."

The Constitution prohibits discrimination by states as announced in **Ex Parte Virginia,** 100 U.S. 339: **Strauder v. West Virginia,** 100 U.S. 303 (1879), to **Garner v. Louisiana,** 368 U.S. 157 (1961), and **Thompson v. City of Louisville,** et al, 362 U.S. 199. The law is clear that such discrimination is equally repugnant whether it takes the

form of legislation or unequal administration of the law by public authority, including state trial and appellate courts. **Henderson v. Mayor of New York,** 92 U.S. 259; and **Mooney v. Holohan,** 294 U.S. 103 at page 113. As this Court said in **Rogers v. Alabama,** 192 U.S. 226, at page 230:

> "It is necessary and a well settled rule that the exercise of jurisdiction by this Court to protect Constitutional right cannot be declined when it is plain that the fair result of a decision is to deny the right."

Conclusion

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

This is to certify that two copies of the above and foregoing petition has been served on John L. Lawler, Esq., attorney for the respondent, at 902 Roberts Building, Box 1652, Mobile, Alabama 36602, via United States mail, postage prepaid this ..... day of April, 1969.

.....
Of Counsel